United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

ORIGINAL

No. 75-4089
No. 75-4121

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,
Petitioners,

and

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,
Intervenor,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WRITERS GUILD OF AMERICA, WEST, INC.,
Respondent.

B
P/S

RESPONDENT GUILD'S OPENING BRIEF.

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RESPONDENT GUILD'S OPENING BRIEF.

STATEMENT OF THE CASE.[1]

A. Preliminary Statement.

The National Labor Relations Board ("Board") found a violation of § 8(b)(1)(B) of the Labor Management Relations Act, 29 U.S.C. § 158(b)(1)(B), in the Writers Guild of America, West, Inc.

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[1]For brevity, we shall not repeat what appears in the Statement of the Case of the Board's brief, except to the extent we disagree with those statements. We shall also use the Board's abbreviations and shortened names, where applicable.

("Guild") disciplining certain of its members for crossing and working behind the Guild's picket lines during an economic strike. The affected members are described as "hyphenates," because they perform more than one function in the industry [A 135; Tr. 834/9-15[2]]. Producers, directors, story editors and certain corporate executives are the hyphenates involved.

B. The Duties of the Persons Involved.

1. Writers.

The expired agreements set forth the definition of a writer as persons engaged for the "writing or preparing" of literary material, and for "making revisions, modifications or changes" in such material [GCX 2, art. 1.B.1.a.(1) and (2) at 3, and art. 1.C.1.a.(1) and (2) at 7; GCX 9, *ibid.*].

Revisions, modifications or changes of literary material include "rewriting"[3] [Tr. 743/2-20; Tr. 1012/8-17 (resp. witness); Tr. 1164/23 to 1165/3 (*ibid.*)] and "polishing" of such material[4] [Tr. 426/2-9; Tr. 486/

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[2]This designation is to the transcript of proceedings before the Administrative Law Judge, page 834, lines 9-15. Where the testimony of a witness other than one presented by the General Counsel or one of the charging parties is cited, it shall be so indicated; and where relevant, other witnesses' names will likewise be indicated.

[3]A "rewrite" is defined in the agreement as "the writing of significant changes in the plot of, story line of, or interrelationship of characters in a screenplay, submitted by the Company to a writer for the purpose of making such changes" [GCX 2, art. 1.B.7. at 6; GCX 9, *ibid.*].

[4]As distinguished from a rewrite, *see* note, 3, *supra,* a "polish" is a minimal alteration of a script or scene [Tr. 719/24 to 720/3]. A polish is performed for the purpose of "honing the material. Trying to make the dialogue better, more satisfactory. Trying to make . . . your effects more dramatic. Trying to meet very specific production problems . . ." [Tr. 1165/10-13 (resp. witness)].

18-25; Tr. 743/2-20; Tr. 991/24-25 (resp. witness); Tr. 1165/4-14 (*ibid.*); *see* Tr. 238/15-23].

Changes in literary material can be either written or oral [Tr. 1279/20 to 1281/1 (resp. witness); GCX 2, art. 1.B.1.a.(2)(h) at 3, and art. 1.C.1.a.(3)(h) at 7; GCX 9, *ibid.*]. For example, one hyphenate Guild member testified that he collaborates with another writer to whom he gives the notions which the other person then writes down [GCX 16 F 57/1-26]. For this the hyphenate receives story credit, despite the fact that he has never put a pen to paper [*id.*, 57/27 to 58/5].

2. Producers, Directors, Story Editors and Others.

Both before and during the strike, producers, directors, story editors and others engaged in certain services, described as "(a) through (h) functions,"[5] of which the semantical description appears to engender some obfuscation, the Board claiming that these are supervisory functions and the Guild showing otherwise.[6]

In addition to the duties which the Board, in its brief, ascribes to producers, those producers with the capability may also be involved in writing. (The usual progression of hyphenates in the industry is from writer to producer or director [Tr. 90/21 to 91/2; Tr. 243/11-25; *see also* the example described in this brief at 37].) The process starts with the producer either himself getting an idea for a script, hiring someone to create

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[5]The "(a) through (h) functions" are described in the 1970 Guild Agreement [GCX 2, art. 1.B.1.a.(2)(a) through (h) at 3, art. 1.C.1.a.(3)(a) through (h) at 7; GCX 9, *ibid.*], and are discussed in the next section of this brief.

[6]*See* section D.2. of the Argument of this brief, *infra*.

it under his supervision, or purchasing an existing concept [A 139; Tr. 199/18 to 200/2]. Once a deal is made with a production company the producer is charged with developing the idea to the point where it can be approved as a going project. This involves hiring or supervising the services of writers, or perhaps himself writing the script [Tr. 200/6-12; A 139]. (Some producers—those who are hyphenates or writers —are hired by the employer specifically because they can, and do also write [Tr. 238/13-17].)

A hyphenate producer may perform both producing and writing functions simultaneously, at times on the same project [Tr. 255/8-12; Tr. 301/9-25; 304/14 to 306/12], or other times even producing on one project, while writing on another [Tr. 306/20-21]. During the course of production he can also be called upon to do some or all of the following functions: (1) Make contributions in the preliminary creative writing stages [Tr. 61/3-4; GCX 2, art. 1.B.1.a.(2)(h) at 3, and art. 1.C.1.a.(3)(h) at 7; GCX 9, *ibid.*]; (2) suggest changes to the writer in the direction or approach of the story [Tr. 56/9-11; GCX 2, *ibid.*; GCX 9, *ibid.*], and sit in on story conferences to help criticize the drafts [Tr. 439/2-5; GCX 2, *ibid.*; GCX 9, *ibid.*]; (3) make suggestions to the writer regarding, or actually writing dialogue [Tr. 351/17 to 352/5; Tr. 744/25 to 745/25; GCX *O* 129/4-18]; (4) participate in revisions of the script, and sometimes rewrite scripts himself [Tr. 243/11-19; Tr. 274/13-15; Tr. 447/19 to 448/3; Tr. 775/14-16; GCX 16 *O* (May 21, 1973) 129/4-27]; (5) polish and touch up scripts [Tr. 238/19-23; Tr. 244/14-17; Tr. 447/19 to 448/3]; and (6) perform (a) through (h) functions [Tr. 251/1-10; Tr. 325/22-25], including

cutting or editing material from scripts [GCX 16 D 62/13 to 63/4; GCX 16 H 84/19-25].

Similarly, a hyphenate story editor performs some or all of these functions: (1) Additional writing on completed scripts [Tr. 68/14-16]; (2) rewriting [Tr. 161/1 to 162/2; Tr. 352/16-23; Tr. 518/22-25; GCX 16 M 39/22 to 40/1]; (3) doing (a) through (h) functions [Tr. 251/1-13]; (4) changing words [Tr. 361/4-7]; and (5) polishing scripts [Tr. 518/22-25; GCX 16 M 39/22 to 40/2].

And a director performs the following if he has the capability: (1) Changes dialogue, lines or scenes [Tr. 629/1-17; GCX 16 E 75/28 to 76/9; GCX 16 F 69/14-25]; and (2) does (a) through (h) functions [GCX 2, art. 1., ¶ C, § 1.a.(3) at 7].

C. Applicability of the Agreement to Hyphenates.

1. The (a) Through (h) Functions.

In describing the (a) through (h) functions, the Board's brief purports to cite the agreement for the proposition that (a) through (h) constitutes "eight *editorial* functions which producers, directors, and story editors could perform without functioning as 'writers' under the agreement" (emphasis added). The italicized word, as it actually appears in the agreement, however, is "writing": the agreement states that these functions are "writing services," which are permitted by the Guild to be done by persons outside the bargaining unit.

2. Writing Services Other Than (a) Through (h).

When engaged in more extensive writing than that described by the (a) through (h) functions, hyphenates

are required to have a separate contract covering their writing duties [GCX 2, art. 14(a) at 53; GCX 9, *ibid.*; Tr. 74/11-18; Tr. 299/12 to 300/13], and those involved in this case who were questioned, in fact at the time of the strike had a personal service contract under which the employer could require that they perform writing services for compensation, separate from compensation for other services [Tr. 426/2-9 (Joe Swerling—writer-producer); Tr. 589/2-5 (John Mantley—writer-producer); GCX 16 D 44/14-21 (Jon Epstein—writer-producer); GCX 16 E (May 23, 1973) 85/10-14 (John Crichton—writer-director); GCX 16 J 57/19 to 58/1 (Herman Saunders—writer-producer); GCX 16 L 71/26 to 72/4 (Coles Trapnell—story editor); *see also* Tr. 485/11 to 499/19].

D. Hyphenates Cross and Work Behind Picket Lines.

For their own reasons some of the hyphenates crossed the Guild's picket lines. In addition to crossing, some worked behind the picket lines as well.[7]

Because of the inaccessibility of the work area, the Guild was required, with insignificant exceptions, to rely upon the hyphenates' version of what they did while at work [A 172]. Of the fifteen hyphenates who were tried by the Guild, eleven did not attend their trials to testify about the work they performed [GCX C, D, E, G, I, J, K, L, M, N and *O*].

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[7]Cy Chermack testified at his Guild trial that when he crossed the picket line he did so as "an act of defiance" [GCX 16 A 80/27 to 81/1]. He made a few personal, but no business phone calls [*id.*, 80/22-26], and neither he nor the employer considered that he was working [*id.*, 80/18-21]. William Roberts was on the lot mostly as an observer [GCX 16 H 72/7-11].

E. Collective Bargaining and Grievance Adjustment Functions of Hyphenates.

There was adequate testimony that at least some of the hyphenates engaged in collective bargaining or the adjustment of grievances vis-a-vis persons other than writers.

None of the hyphenates is alleged to have engaged in collective bargaining with the Guild.[8] And there is only a single specific instance of an alleged adjustment of a Guild member's grievance, involving whether or not a commitment had been made to a writer.

F. Irrelevant Issues.

Finally, there are a number of factual matters which, while interesting, are irrelevant to this proceeding. The first concerns the attempted resignation from the Guild of one of the hyphenates. This is irrelevant because the Administrative Law Judge found that it was not a charged violation of the Act and no finding could be predicated upon that incident [A 177]. The second is the amount and disposition of the fines assessed against the hyphenates. This is irrelevant because it is a matter of state court concern should the Guild seek to collect the fines. *NLRB v. Boeing Co.*, 412 U.S. 67, 74 (1973); *see Los Angeles Bldg. Trades Council (Noble Elec.)*, 217 N.L.R.B. No. 139, 89 L.R.R.M. 1153, 1155 (1975).

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[8]The closest the testimony came, was when one of the persons who sat in on negotiations related that he came back and discussed these matters with Frank Price [Tr. 108/8-22].

ARGUMENT.

A. Introduction and Statement of the Issues.

Our concern in this case is with § 8(b)(1)(B), which reads as follows:

> Sec. 8
>
> . . . .
>
> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

1. The Board's Interpretation of § 8(b)(1)(B) Prior to Florida Power.

Although part of the Act since 1947, this section was before the Supreme Court for the first time just two years ago, in *Florida Power & Light Co. v. International Bhd. of Elec. Workers, Local 641*, 417 U.S. 790 (1974). Reviewing the Board's treatment of § 8(b)(1)(B), the Court found that the interpretation of the section in the first 20 years of Board decisions, from 1947, had been limited to situations "clearly falling within the metes and bounds of the statutory language," 417 U.S. at 798, such as a union's picketing to attempt to secure a replacement of an employer's industrial relations consultant; attempting to force an employer to join or resign from multi-employer bargaining associations; or attempting to compel the selection of particular foremen. 417 U.S. at 798-99. But in 1968 the Board charted a new course, holding in the case of *San Francisco-Oakland Mailers' Union 18 (Northwest Pub., Inc.)*, 127 N.L.R.B. 2173 (1968),

that a union violated § 8(b)(1)(B) by disciplining a foreman for the manner in which he interpreted the collective bargaining agreement. 417 U.S. at 799-800. (By describing the decisions prior to *Oakland Mailers'* as "clearly falling within the metes and bounds of the statutory language," the implication is that *Oakland Mailers'* is not in that category.)

The *Oakland Mailers'* approach had been followed by other Board cases which found violations not only in union discipline of supervisors for the manner in which they exercised their collective bargaining and grievance adjustment functions, but also for the way they performed their non-§ 8(b)(1)(B) functions, so long as those supervisors possessed the authority to engage in collective bargaining or grievance adjustment.[9] *Florida Power, supra,* 417 U.S. at 800.

Florida Power involved a striking union's discipline of supervisor-members for their having "crossed the picket lines and performed rank-and-file struck work, i.e., work normally performed by the nonsupervisory employees then on strike." 417 U.S. at 791-92. The Board sought to justify its findings that the union violated § 8(b)(1)(B), by urging that the discipline for having crossed a picket line would " 'drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform.' " *Florida Power, supra,* 417 U.S. at 806.

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[9]A "§ 8(b)(1)(B) function" or activity is a shorthand description of the authority required of an employer's representative under § 8(b)(1)(B), which prohibits restraint or coercion of an employer in the selection of his representatives "for the purposes of collective bargaining or the adjustment of grievances."

Examining both the statutory language and the legislative history,[10] the Court concluded that Congress had not intended by § 8(b)(1)(B) "to extend protection to the employer from union restraint or coercion when engaged in any activity other than the *selection* of its representatives for the purposes of collective bargaining and grievance adjustment." *Florida Power, supra,* 417 U.S. at 804 (emphasis in original).

> To the Court, the conclusion was inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer. *Florida Power, supra,* 417 U.S. at 804-05.

Section 8(b)(1)(B) was designed for the protection of employers.[11] Not since 1947, when Congress amend-

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[10]The most relevant legislative history of § 8(b)(1)(B) to the present review is set forth in *Florida Power,* 417 U.S. at 803 and 804, in the following two comments of Senator Taft: "Under this provision it would be impossible for a union to say to a company, 'We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally.' Under the bill the employer has a right to say, 'No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with.' "

The second comment of Senator Taft is this: "This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'we do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you will have to fire him, or we will not go to work.' "

[11]"Both the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional concern with

ed the definition of "employee" in § 2(3) of the Act, 29 U.S.C. § 152(3) to exclude supervisors, have supervisors been entitled to the benefits of this law in terms of protection from either their employers or unions. *Florida Power,* 417 U.S. at 807-09; *Beasley v. Food Fair,* 416 U.S. 653, 656 (1974) ("Taft-Hartley amendments exclude supervisors from the protections of the Act"). (For this reason, as well as for the reasons mentioned in section F of the Statement of the Case, *supra,* the questions of whether supervisors were permitted to resign, and the amount of the fines, are irrelevant).

The legislative scheme has been to permit employers, under appropriate circumstances, to secure their supervisors' loyalty through requiring the supervisors, on pain of discharge, to sever their membership and fraternal relations with unions. *Florida Power,* 417 U.S. at 807-08. Where the employer permits supervisors to retain their union connections because it is in the employer's interest (as was the case here [A 174]), the employer may protect the supervisor from intra-union discipline through the collective bargaining process. *See NLRB v. News Syndicate Co.,* 365 U.S. 695, 696 (1961) (collective bargaining clause protects supervisor); *Florida Power,* 417 U.S. at 796 (*ibid.*); *International Union of Operating Eng'rs, Local 9 (Shelton Pipeline & Constr., Inc.),* 213 N.L.R.B. No. 92, 87 L.R.R.M. 1247, 1248 (1974). On the other hand, where, as was the case here, the employer has specifically permitted supervisors to honor picket lines [GCX

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the protection of *employers* in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances." *Florida Power,* 417 U.S. at 803 (emphasis added).

2, art. 7.2 at 22; GCX 9, *ibid.*], the employer cannot complain when the supervisors do so either voluntarily or by compulsion.

2. The Interpretation of § 8(b)(1)(B) After Florida Power.

In light of *Florida Power,* the Board has modified its position in § 8(b)(1)(B) cases. With Member Fanning dissenting from the too-narrow reading of the Supreme Court's decision, the Board limits that case to its specific facts. The Board now no longer finds a violation if a union-disciplined supervisor performed "more than a minimal amount" of rank-and-file work upon crossing the union's picket line.[12] That constitutes a slight retreat by the Board from its pre-*Florida Power* position. Another area of retreat has been directed by this Court's requirement that the Board establish in each case the disciplined supervisor's authority to adjust grievances or bargain collectively. *See NLRB v. Rochester Musicians Ass'n Local 66,* 514 F.2d 988, 1001 (2d Cir. 1975).

3. Issues Presented.

The issues presented here, based upon *Florida Power,* the language and history of § 8(b)(1)(B), and this Court's decision in *Rochester Musicians Ass'n,* are (1) whether the hyphenates in this case, assuming

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[12]*See Bakery Workers Local 24 (Food Employers Council, Inc.),* 216 N.L.R.B. No. 150, 88 L.R.R.M. 1390, 1391-92 (1975) (complaint dismissed because "the supervisor-members . . . performed much more than a minimal amount of rank-and-file work during the strike"). *Accord, Detroit Pressmen's Union, Local 13 (Observer Newspapers),* 217 N.L.R.B. No. 94, 89 L.R.R.M. 1141, 1142 (1975); *Local 1959, United Bhd. of Carpenters (Aurora Modular Indus.),* 217 N.L.R.B. No. 82, 89 L.R.R.M. 1037 (1975); *United Bhd. of Carpenters, Local 14 (Max M. Kaplan Properties),* 217 N.L.R.B. No. 13, 89 L.R.R.M. 1002, 1003 (1975).

they had § 8(b)(1)(B) functions and did no rank-and-file work, can be disciplined for crossing and working behind the Guild's picket lines; (2) whether the disciplined hyphenates had § 8(b)(1)(B) functions; and (3) whether the hyphenates performed more than a minimal amount of rank-and-file work with respect to the occasion and incidents for which they were disciplined.

B. The Hyphenates Were Not Disciplined for the Purpose or With the Effect of Restraining or Coercing the Employers in Their Selection of Bargaining or Grievance Adjusting Representatives.

For the purpose of the argument under this heading we shall assume, but not concede, that the hyphenates had § 8(b)(1)(B) functions during the course of the labor dispute, and that they did no rank-and-file work. Even at that, our position is that they may be disciplined for attempting to break the Guild's strike.

1. There Has Been No Showing of an Unlawful Objective or Affect.

The syllogism propounded by the Board in this case in support of the proposition that § 8(b)(1)(B) is violated by a union's attempts to prevent grievance adjusting-supervisors from crossing a picket line, is that:

> [W]hen Respondent . . . sought to prevent . . . hyphenate members [with § 8(b)(1)(B) authority] from going to work in their managerial and supervisory capacities . . . during the strike, Respondent obviously coerced and restrained their employers in the selection of those specific [hyphen-

> ates] for the purpose of collective bargaining and the adjustment of grievances . . . [A 176; *see also* A 175-77].

(The lately discovered additional rationale presented by the Board's brief writers that the foreseeable consequences of the hyphenates' being disciplined would affect their future grievance adjusting and bargaining capabilities was not a stated basis of the Board's decision. Without the benefit of the Board's view on the matter, this Court need not rule on that theory.)[13]

The Board reasons in our case that the hyphenates' absence deprives the employer of its § 8(b)(1)(B) representative, and this restrains and coerces the employer in the selection of its representatives. If such a theory were valid, *Florida Power* would have no meaning. The supervisors in *Florida Power*, in addition to doing rank-and-file work, did collective bargaining

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[13]*Cf. Kansas Milling Co. v. NLRB*, 185 F.2d 413, 420 (10th Cir. 1950). Moreover, the authorities upon which the Board's brief relies in support of this belated theory, were all decided prior to *Florida Power*. For example, in the cited *Safeway Stores* case, *Meat Cutters Local 81 (Safeway Stores)*, 185 N.L.R.B. 884, 888 n.11 and preceding text (1970), the Board's decision found support in cases such as *Toledo Local 15-P, Lithographers (Toledo Blade Co.)*, 175 N.L.R.B. 1072 (1969), the rationale of which was: "As the Board held [in *Oakland Mailers*'], such discipline by a union . . . is an unwarranted 'interference with [the] employer's control over its own representatives,' and *deprives the employer of the undivided loyalty of the supervisor.*" 175 N.L.R.B. at 1080 (emphasis added).

The citation of such incestuous cases which rely one upon the other for authority, does not advance the discussion where the underlying doctrine of the initial cases, and the implicit basis of the argument now, is the discredited conflict-of-loyalties theory of a violation of § 8(b)(1)(B). *See Florida Power*, 417 U.S. at 811.

and adjustment as well.[14] And the same is true of the supervisors in the Board cases cited in note 12, *supra* (where all that was required to avoid a § 8[b][1][B] violation, according to the Board, was that a supervisor with § 8[b][1][B] functions, only do "more than a minimal amount of rank-and-file work").

To say that an employer is coerced and restrained in the selection of its bargaining representative in one case and not another, where the employer has two supervisors who are disciplined by the union, one of whom does more than a minimal amount of rank-and-file work and the other of whom does less, is an argument worthy of a sophist but not of the Board. *In both cases the employer is deprived of the supervisors' § 8(b)(1)(B) services.* Yet the Board would find a violation in the second case and not the first. (The alternative theory, that advanced by the Board's brief writers, see text preceding note 13, *supra,* is irrelevant to this case because it was not a basis of the Board's decision; but at least it does not share the internal inconsistency of that on which the Board did rely. That theory too, as shall be shown below, is in any event inapplicable to this case.)

Prior to *Florida Power* the Ninth Circuit concluded with respect to three supervisors who were disciplined for refusing to honor a picket line, that "there is no reason to treat them differently than non-supervisors," since "the [employer's] right to select manage-

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[14] *See International Bhd. of Elec. Workers System Council U-4 (Florida Power & Light Co.),* 193 N.L.R.B. 30, 33 app. A (1971) (supervisors possessed authority to adjust grievances and to act as representatives in matters involving collective bargaining interpretations).

ment representatives under Section 8(b)(1)(B) is not affected by the Union's action." *NLRB v. San Francisco Typographical Union 21*, 486 F.2d 1347, 1349 (9th Cir. 1973) (*rehearing en banc denied*), *cert. denied*, 418 U.S. 905 (1974). Concurrently, the court sustained the Board's finding that the union had violated the Act by fining one of the supervisors for having discharged an employee. *Ibid.* On the same day as the Supreme Court decided *Florida Power*, it denied the Board's petition for certiorari in *San Francisco Typographical Union*. 418 U.S. 905 (June 24, 1974).

The only object of the discipline in this case was to secure the hyphenates' support of the strike, an important object which is entitled to protection under the Act. *See NLRB v. Granite State Joint Bd.*, 409 U.S. 213, 218 (1972) (Burger, C.J., concurring opinion) ("unions have need for solidarity and at no time is that need more pressing than under the stress of economic conflict").[15]

There was no evidence of an intent on the Guild's part to affect the employers' selection of representatives for the purposes of collective bargaining or adjusting grievances, nor was there any testimony of such an effect. The only testimony in this regard was that

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[15]*See also* Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1066 (1951) ("The union may punish not only those who do the work of men who are on strike, but also those who give the employer any other aid during the strike"); Note, 87 Harv. L. Rev. 458, 469 n.70 (1973): "Discipline of strikebreaking supervisors who perform supervisory work . . . vindicates an important union interest—the preservation of the strike as an effective economic weapon. Given the clear and direct impact of discipline for strikebreaking upon the union's interest, and the more speculative and indirect impact upon the employer's representation, the interest balancing analysis would appear to suggest that such discipline be found lawful"; 8 Suffolk U. L. Rev. 728, 758-59 (1974); Note, 19 Villanova L. Rev. 519, 530 (1974).

if after the strike Guild members would not work with the picket line-crossing hyphenates, it would adversely affect the hyphenates' ability to hire top writers [Tr. 230/18 to 231/23]. At best, this can be classified as restraint and coercion of the employers in the selection of their representatives for the purposes of hiring employees. But a representative for the purposes of hiring employees is not in the same category as bargaining and grievance adjustment, and this evidence cannot be transmogrified into a § 8(b)(1)(B) violation. The only consequence of the Guild's discipline of hyphenates would be to keep them from breaking their labor organization's strike, a lawful and laudable objective.

The Supreme Court has generally disapproved of the Board's attempt to involve itself in the collective bargaining process and in the relative strengths of the bargaining parties. *See generally NLRB v. Insurance Agents' Union*, 361 U.S. 477 (1960) (Board may not sit in judgment on the types of economic weapons used by the parties). The same is true here. We read the Supreme Court's decision in *Florida Power* as a direction to the Board to stay out of the arena of union-management conflict, and to follow the express instructions of Congress as contained in § 8(b)(1)(B), namely, to be concerned solely with restraint and coercion by unions toward the end of determining the employer's *selection* of its collective bargaining and grievance adjustment representatives. *Florida Power*, 417 U.S. at 804 (emphasis on the word "selection," is the Court's).

It was not the Court's intent, as we read the *Florida Power* decision (and as it is read by Member Fanning), to have the Board niggle at every nuance of § 8(b)(1)

(B). It was, rather, a broad decision seeking to put an end to the Board's expansion of the strict statutory terms.

2. The Hyphenates Had a Personal Stake in the Outcome of the Strike, and It Is Inequitable to Permit Them to Avoid Their Membership Obligations.

The discipline imposed on the hyphenates was shown to have no motivation other than to help win the strike, and "there is no reason to treat them differently than non-supervisors." *NLRB v. San Francisco Typographical Union 21,* 486 F.2d 1347, 1349 (9th Cir. 1973), *cert. denied,* 418 U.S. 905 (1974).

In *Florida Power* the Supreme Court dealt with supervisors' obligations in a strike situation:

> [T]he fact that the supervisor will in some measure be the beneficiary of any advantages secured by the union through the strike makes it inherently inequitable that he be allowed to function as a strikebreaker without incurring union sanctions. *Florida Power & Light Co. v. International Bhd. of Elec. Workers, Local 641,* 417 U.S. 790, 812 n.22 (1974).

Not surprisingly, the range of reasons submitted by the hyphenates for maintaining their membership in the Guild was relatively narrow, since most who write are constantly at the trade and when so employed are required by the Guild shop clause of the agreement to be members [GCX 2, art. 6 at 81-21; GCX 9, *ibid.*]. In addition, story editors are specifically covered by article 14.B. of the agreement [GCX 2, art. 14.B. at 53; GCX 9, *ibid.*].

The evidence showed that Guild membership is retained by some hyphenates because of a moral commitment to the organization that fought for the scales that writers now receive [Tr. 347/5-9; GCX 16 F 57/1-26]. More importantly, however, in terms of the fair-share concept quoted above, membership is maintained by others because of the desire to write or do similar creative work in the future and to receive for such services the remuneration which the Guild negotiates [Tr. 347/10-25], and because they perform writing functions in connection with their current employment and presently receive the benefits of the agreement [Tr. 557/7-24; Tr. 743/2-20].

Membership in the Guild is not only of monetary and moral benefit to the writer, *qua* writer, but as the Board acknowledges, it is of benefit to the employer [A 174; Bd. br. at n.4], and thus is an association which makes the hyphenate a more esteemed supervisor.

In addition to receiving valuable benefits from membership in the Guild, hyphenates are beneficiaries of the agreement which the Guild negotiates. Those who were asked, acknowledged that they had a personal service contract with their employer under which they could be required to perform writing functions for compensation.[16] When writing, producers, directors and executives are covered by the Guild's agreement [GCX 2, art. 14.A. at 53; GCX 9, *ibid.*]. And when employed in their capacity as story editors, hyphenates are specifically subject to all of the terms of the agreement, have their compensation expressly set forth at 150% of the minimum compensation of the writers whose services they coordinate, and receive all of the agree-

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[16]*See* Statement of the Case, section C.2., *supra.*

ment's fringe benefits [GCX 2, art. 14.B. at 53; GCX 9, *ibid.*; RX 17, ¶ 4]. All hyphenates additionally have had negotiated for them the right in their non-writing as well as in their writing capacities, to observe a strike called by the Guild and not go to work [GCX 2, art. 7.2. at 22; GCX 9, *ibid.*].

Rank-and-file writers who receive the benefits of the Guild agreement and of membership, are subject to discipline in order to maintain their solidarity. *See NLRB v. Granite State Joint Bd.*, 409 U.S. 213, 218 (1972) (concurring opinion). To permit hyphenates simply on the basis of their supervisorial status to take a free ride, is contrary to the concepts of sharing the burden of *collective* bargaining.

The issue of whether supervisors may be disciplined for crossing a picket line, by logic and by the legislative history of § 8(b)(1)(B) must be answered in the affirmative.[17] Unlike the deference due a Board decision which is interpretive of the Act, in this case the Board is purporting to construe the construction of the Act by the Supreme Court, a matter which is a judicial function no less than an agency's. *See Local 14055, United Steelworkers (Dow Chem. Co.) v. NLRB*, 524 F.2d 853, 90 L.R.R.M. 3281, 3286 (D.C. Cir. 1975). The equities of the situation too, dictate the conclusion that supervisors are not immune from discipline for strikebreaking.

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[17]It is conceivable that by denying certiorari in *NLRB v. San Francisco Typographical Union 21*, 486 F.2d 1347 (9th Cir. 1973), *cert. denied*, 418 U.S. 905 (1974), where the issue was the fining of strikebreaking supervisors who had not performed rank-and-file work, the Supreme Court was answering this issue in the affirmative. (*San Francisco Typographical* was denied certiorari on the same day that *Florida Power* was decided.)

C. The Disciplined Hyphenates Had No § 8(b)(1)(B) Functions Such as to Protect Their Employers From Restraint and Coercion.

On the following separate grounds, no § 8(b)(1)(B) violation can be found.

1. The Hyphenates Do Not Adjust Writers' Grievances, and Are, Therefore, Not § 8(b)(1)(B) Representatives Vis-a-Vis Writers.

a. *Producers, Directors and Executives.*

There was testimony with respect to some producers —not all—some directors—again, not all—and some executives—still, not all—that they adjusted grievances. The grievances they adjusted, however, were not for writers. Hyphenate executives handled matters for secretaries, and hyphenate producers and directors settled disputes for actors and stunt persons.

The citations in the Board's brief to purported grievance adjustment incidents for writers simply do not materialize. Two examples appear. One relates to an alleged determination as to whether a binding commitment had been made to a writer, and the other to the alleged allocation of disputed screen credits between competing writers.[18]

i. *The Writing Commitment.*

There is a transcript reference to Tr. 165-66 for the proposition that directors and producers handle grievances of writers over such matters as writing com-

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[18]In the Board's brief there are 16 page citations purporting to refer to grievance adjustment responsibility. With the exception of those to be discussed in the text of our brief, none of them purport to concern writers' grievances, or purport to set forth the authority of any person in the resolution of writers' grievances.

mitments. The witness was Sheldon Mittleman [Tr. 51/5-12], employed as an attorney in the law department of Universal City Studios, Inc. [*id.*, 51/7-18]. He testified about the authority of a producer to settle a grievance over whether or not a writing commitment had been made to a writer:

> That dispute was taken to the producer, Paul Mason; it was *not* resolved at that level. . . .
>
> It was referred to me, and eventually wound up in the conciliation procedures of the Writers Guild . . . [Tr. 165/14-19 (emphasis added)].

If the testimony of Mittleman is not sufficient to show that in fact the producer (or the attorney, for that matter) did *not* have the authority to "adjust" the writer's grievance, the entire dispute was explained on cross-examination:

> Q . . . .
>
> So we are clear on what you are talking about, the complaint was made by the free lance writer, that [producer] Paul Mason had made a . . . commitment to employ . . .?
>
> A No. The complaint was that Universal City Studios, Inc., had made a commitment to him.
>
> Q Through Mason? . . .
>
> And Mason said "I didn't make the commitment." Is that correct?
>
> A That is correct, as I recall it, yes.
>
> Q So Mason's participation in that grievance, which was a grievance of a guy contending that he has been engaged as a free-lance writer, was to say, "I didn't engage you," and he was supported by management and it went to the Guild and the grievance procedures?
>
> A That is correct [Tr. 177/2-19].

What we have is a dispute over whether a writer was *hired,* and the producer was being questioned about whether in fact he hired the writer. (We do not contest that producers are supervisors for the purpose of hiring writers.) But no amount of polishing of this scene can make it establish that producers have authority to adjust writers' grievances.

Despite the employers' right of control and contractual authority to direct the performance of the writers' work, writers, although employees, are somewhat akin to independent contractors: They often work at locations of their own, away from the employer's place of business; and the agreement is so elaborate [GCX 2] that the adjustment of grievances is done by lawyers [Tr. 165/14-19]. It may be for these reasons more than any other that the General Counsel was unable to show grievance adjustment functions of those who supervise the writers.

ii. *The Assignment of Credit.*

The second example of grievance adjustment functions was that producers and story editors allocate disputed screen credits between competing writers. For this proposition that Board's brief cites to Tr. 235-36. The witness there testified that either a producer or a story editor will make an initial determination of who is to receive screen credit for a story:

> [T]hey [the producer or story editor] would then submit a tentative list of credits to the Writers Guild.
>
> Q What happens if the Guild disagrees with that determination?
>
> A Well, I don't know—the Guild has to approve it. But anyone of the writers could also

dispute it, at which point they have an opportunity to arbitrate it before the Guild's Credits Committee [Tr. 236/25 to 237/7].

The other transcript reference, Tr. 335, was essentially the same. Neither of these references relates to the adjustment of grievances, but rather, to the initial determination of a disputed issue which is then adjusted *by the Guild*. A writer dissatisfied with a credit determination goes not to his employer to complain, but to the Guild since the agreement provides for *unilateral* Guild, not Guild-employer, determination of credit [GCX 2, art. 8 at 24, and schedule A]; and it is so understood by the witnesses:

Q . . . .

If the scene is changed substantially who gets the writing credit?

A The Writers Guild of America automatically arbitrates any writing that is done within a production company.

So *the decision, in other words, is the Guild's; no one else's* [Tr. 668/9-14 (emphasis added)].

These are the only examples of producers' purported grievance adjustment functions vis-a-vis writers; and they simply cannot sustain the conclusion that such functions exist. The first example, of whether a writing commitment was made, shows only that a producer has authority to hire a writer. The second example, of assignment of screen credits, shows that neither the producer nor the story editor has authority to adjust a writing credit dispute; such authority rests solely with the Guild.

b. *Story Editors.*

The only subjects of story editors' purported grievance adjustment functions, were writers [Bd. br. at n.8]. As the first example [Tr. 69-70], a situation consisting of a disagreement between a writer and a story editor over the approach to a story is described:

> And [*if*] *the disagreement cannot be resolved between the two*—more often than not, I believe it is—but *it might then go up to the next step of management who will again make the determination* as to whose approach is more appropriate [Tr. 70/17-20 (emphasis added)].

Rather than an example of a story editor's authority to adjust grievances (parenthetically, we cannot agree that a dispute over the approach to a story can be termed a grievance), this example shows the story editor's *lack* of authority since the dispute in order to be adjusted must go "to the next step of management."

This comports with the testimony of other story editor-witnesses for the General Counsel, such as the one who said that his authority in connection with grievances was "only as a mediator" [Tr. 535/16-18], or the one who said that he could "exert *influence* in the settling of those grievances" ("those grievances" to which he referred were over writing credit, which has been discussed above and which cannot be said to be a grievance adjustable by management), and "ameliorating writers' feelings when things have to be rewritten" [Tr. 471/3-11 (emphasis added)]. These quoted examples that the Board's brief cites, purport to show grievance adjustment authority on the part of story editors, but in fact show the inability to

make an adjustment which is binding on a writer or the employer.

The final example cited for the proposition that it is within the province of a story editor to resolve grievances, was one in which the witness could not "think of a single serious disagreement between the writer and the members of our production staff," or a single example of a grievance adjustment [Tr. 571/1-9].

There was no substantial evidence of any grievance adjustment functions on the part of story editors, either as to writers or anyone else.

c. *The Hyphenates Are Not § 8(b)(1)(B) Representatives Vis-A-Vis Writers.*

Although some hyphenates (other than story editors) may have § 8(b)(1)(B) functions, we have shown above that they do not have this authority as to writers. This alone should suffice as evidence that neither the object nor the effect of the Guild's discipline was to interfere with the employer's selection of its collective bargaining or grievance adjustment representatives. For it would be a matter of no consequence to the Guild whether a particular hyphenate or any other supervisor adjusted grievances for actors, make-up artists or others. Thus, it cannot be said that a foreseeable consequence of the Guild's discipline would be to adversely affect the manner in which the hyphenates in the future would handle grievances for the employer when dealing with the Guild—for they don't adjust such grievances![19]

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[19]This also answers the argument in the Board's brief which, as we have shown, see text preceding note 13, *supra,* was not a basis of the decision.

The sum of the arguments we have made above, is that the hyphenates had neither collective bargaining nor grievance adjustment functions with respect to writers, and therefore are not the type of representatives contemplated by § 8(b)(1)(B). In the following sections we shall show that in any event, there is no substantial evidence to support the Board's finding of a § 8(b)(1)(B) violation.

2. There Was No Testimony About Each of the Hyphenates Concerning Whom the Board Seeks a Remedy.

Finding of authority to adjust grievances is a prerequisite to a § 8(b)(1)(B) violation, *NLRB v. Rochester Musicians Ass'n, Local 66,* 514 F.2d 988, 1001 (2d Cir. 1975), and such a finding must be made as to *each* representative who is alleged to have § 8(b)(1)(B) functions. *Newspaper Guild, Local 187 (Times Pub. Co.) v. NLRB,* 489 F.2d 416, 422 (3d Cir. 1975) ("Each case requires an evidentiary basis from which § 8[b][1][B] status may be inferred"); *see Rochester Musicians Ass'n, supra,* 514 F.2d at 1002 n.7.

A concession of § 8(b)(1)(B) functions was made as to hyphenates other than story editors, and as to persons they supervised other than writers.[20]

As to story editors, there was no showing of any § 8(b)(1)(B) functions; therefore, no violation can be found in the disciplining of these persons. And as to all other hyphenates, as shown above, their § 8(b)(1)(B) activities were limited to employees

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[20] "Respondent . . . concedes that the hyphenates performing many functions in dispute (other than that of story editor) are supervisors within the meaning of the Act, and may adjust grievances of employees other than writers represented by Respondent" [A 118].

other than writers. If the Court agrees that such authority is not relevant to a case involving writers (with respect to whom they had no authority) then no violation can be found in the disciplining of the other hyphenates, either.

3. There Was No Testimony of Grievance Adjustment During the Strike.

We have shown in a preceding section that the grievance adjustment functions of the hyphenates as to employees other than writers is not relevant to this proceeding. This section is limited to showing that during what the Board considers the relevant period there was no evidence of § 8(b)(1)(B) functions on the part of the hyphenates.[21]

The Board's own view of the law in this area is that the relevant period for which to determine the job functions of a § 8(b)(1)(B) representative is during the period for which discipline was imposed. *See United Bhd. of Carpenters, Local 14 (Max M. Kaplan Properties)*, 217 N.L.R.B. No. 13, 89 L.R.R.M. 1002, 1003 n.5 (1975) ("the only relevant inquiry is what the supervisor-member did *during* the employer-union dispute" [emphasis added]). This Court, too

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[21]The statement in the Board's brief that hyphenates adjusted grievances during the strike is not supported by the record citations. Moreover, the citation to Tr. 611, 614 and 855 is *not* to testimony by the hyphenate of what he did during the strike, but to a description of a telephone call which the hyphenate had with a Guild member, in which the hyphenate told the telephone caller what work was being done. *See also* note 7, *supra*, for evidence that no supervisorial work—or any work, for that matter—was being done by some hyphenates.

has recognized the distinction. In *NLRB v. Rochester Musicians Ass'n, Local 66,* 514 F.2d 988 (2d Cir. 1975), it said:

> There is surely no more interference with the actual process of grievance adjustment in union discipline of a supervisor *who at present plays no part in that process,* than there is in discipline of one with actual authority to adjust grievances for performing non-supervisory work. In each case the union's action is too insignificant to affect the management rights protected by § 8(b)(1)(B). 514 F.2d at 1002-03 (emphasis added).

The General Counsel's obligation to establish that the discipline was in contravention of § 8(b)(1)(B), carries with it the burden of establishing that the disciplined supervisor bore § 8(b)(1)(B) responsibilities during the period for which the discipline was imposed, for example, that he engaged in collective bargaining. With the exception of one or two instances of grievance adjustment (each of which related to employees other than writers), this was not done here, and there is no substantial evidence in the record from which the Board could conclude that the disciplined hyphenates performed § 8(b)(1)(B) functions during the strike.

D. The Hyphenates Did Not Perform Less Than a Minimal Amount of Rank-and-File Work.

We disagree with the Board's exegesis of *Florida Power* that if § 8(b)(1)(B) representatives perform less than a minimal amount of rank-and-file work, they may not be disciplined for crossing a picket line. Nevertheless, even on the Board's theory there

is no basis for finding a § 8(b)(1)(B) violation in this case.

1. The (a) Through (h) Functions Are Rank-and-File Work.

Our most fundamental disagreement with the Board is in the conclusion that the (a) through (h) functions are not rank-and-file work. The Board's theory is that when the hyphenates perform these functions, they do work which the parties have acknowledged does not constitute activities reserved to the Guild's non-hyphenate members under the agreements, but rather is accepted as a normal part of the duties and responsibilities of the executives and supervisors [A 148].

This theory amounts to a claim that if supervisors are once permitted to perform rank-and-file work, that work loses its prior characteristics and becomes supervisorial, non-bargaining unit work.

The facts are that the (a) through (h) work is specifically described in the agreement as "writing" [GCX 2, art. 1.B.1.a.(2)(a) through (h) at 3, art. 1.C.1.a.(3)(a) through (h) at 7; GCX 9, *ibid.*]. The agreement then goes on to say, in substance, that the performance of such writing functions by producers, directors, story editors and other supervisors, does not *ipso facto* make the supervisors "writers." Nor need supervisors be compensated under the agreement when performing the limited amount of writing known as (a) through (h).[22] The section in which the (a) through (h) functions are found reads as follows:

A "writer" is a person:

. . . .

[22]The exception, of course, is the story editor, who is compensated pursuant to article 14.B. of the agreements [GCX 2 at 53; GCX 9, *ibid.*].

employed by Company, who performs services (at Company's direction or with its consent) in writing or preparing such literary material or making revisions, modifications, or changes in such literary material regardless of whether such services are described or required in his contract of employment; provided, however that any *writing services described below performed by Producers, Directors, Story Supervisors* (other than as provided in Article 14 hereof), Composer, Lyricists, or other employees, *shall not be subject to this Basic Agreement*[23] and such services *shall not constitute such person a writer hereunder*:[24]

(a) Cutting for time (b) Bridging material necessitated by cutting for time (c) Changes in technical or stage directions (d) Assignment of lines to other existing characters occasioned by cast changes (e) Changes necessary to obtain continuity acceptance or legal clearance (f) Casual minor adjustments in dialogue or narration made prior to or during the period of principal photography (g) Such changes in the course of production as are made necessary by unforeseen contingencies (e.g., the elements, accidents to performers, etc.) (h) Instructions, directions, or suggestions, whether oral or written, made to writer regarding story or teleplay [emphasis added].

The Board's contorted interpretation of the agreement need not be given deference, since the interpre-

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[23]"Shall not be subject to this Basic Agreement," means that the supervisors' compensation for performing the described writing services shall not be subject to the agreement.

[24]"Shall not constitute such person a writer hereunder," means that a supervisor does not become a writer merely by reason of performing the described writing services.

tation of an agreement is a matter on which the courts have at least equal expertise with the Board. *NLRB v. International Union of Operating Eng'rs, Local 12*, 323 F.2d 545, 548 (9th Cir. 1963) (interpretation of contract is a matter of law, to which courts need not defer to NLRB). Where the interpretation inflicted by the Board on the language of the Guild's agreement is so out of synchronization with common reading, it need not be accepted. *Ibid.; see NLRB v. Aluminum Tubular Corp.*, 299 F.2d 595, 599 (2d Cir. 1962) (conclusion of law not entitled to benefit of § 10[e] of Act).

The parties did not stipulate in the agreement, as the Board's decision appears to suggest, that the (a) through (h) functions are descriptive of supervisory duties. All the agreement says is that the Guild does not object to supervisors performing those limited bargaining unit duties described in subsections (a) through (h). Rank-and-file writers continue to perform (a) through (h) functions,[25] and the Board's conclusion that the work has undergone a metamorphosis is not supported by the facts.

How can the Board reconcile its position in this case, with the position it takes in other cases, namely, that the customary pre-strike performance by supervisors of production work does not change that work's characteristics? As an example, the fact that the supervisor in *International Union of Operating Eng'rs, Local 9*

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[25]*E.g.*, Hugh Benson testified that he directed a writer to cut a script that was too long [GCX 16 F 60/22 to 61/7]. The writer thus engaged in function (a), which is cutting for time. Benson also directed that changes be made in lines or words during photography [*id.*, 69/14-25]. The writer thus engaged in function (f), which is minor adjustments made during photography.

(Shelton Pipeline & Constr., Inc.), 213 N.L.R.B. No. 92, 87 L.R.R.M. 1247 (1974), previous to the strike periodically operated the same piece of equipment that he operated during the strike, 87 L.R.R.M. at 1247, did not detract from the rank-and-file nature of that work. In *Bakery Workers, Local 24 (Food Employers Council, Inc.)*, 216 N.L.R.B. No. 150, 88 L.R.R.M. 1390 (1975), the bakery managerial employees spent 45-50% of their pre-strike time doing production work, and the remainder of their time doing supervisorial work. 88 L.R.R.M. at 1391. The regular pre-strike performance of production work by the managers did not convert the production work into managerial work. When the managers continued to perform services in the same proportion as before the strike, they were held nevertheless to be engaged in rank-and-file work. 88 L.R.R.M. at 1391-92. Similarly, in *United Bhd. of Carpenters, Local 14 (Max M. Kaplan Properties)*, 217 N.L.R.B. No. 13, 89 L.R.R.M. 1002 (1975), the supervisor customarily spent half his pre-strike time performing rank-and-file work, 89 L.R.R.M. 1003, and when he did the same following the strike he was found to be performing rank-and-file work, not supervisorial work. *Ibid. Accord, Detroit Pressmen's Union, Local 13 (Observer Newspapers, Inc.)*, 217 N.L.R.B. No. 94, 89 L.R.R.M. 1141 (1975) (50% rank-and-file work before and after strike).

The performance by hyphenates of work which is also performed by rank-and-file writers does not make that work lose its rank-and-file status simply because supervisors are doing it. Nor should the written agreement that such work could be performed by supervisors, distinguish this case from those in which supervisors, by custom, perform rank-and-file work. Especially is

this true in light of the Board's determination that the proportion of rank-and-file work performed prior to the strike has no relevance; "the only relevant inquiry is what the supervisor-member did during the employer-union dispute." *United Bhd. of Carpenters, Local 14 (Max M. Kaplan Properties)*, 217 N.L.R.B. No. 13, 89 L.R.R.M. 1002, 1003 n.5 (1975).

The (a) through (h) work is rank-and-file work, and if, as we show in the following section, the hyphenates performed it during the strike, even under the Board's view of *Florida Power* the hyphenates are not immune from discipline.

2. The Hyphenates Performed Rank-and-File Work.

Despite the fact that this case involves professional writers and one would expect the language used by the parties and witnesses to be clear, the semantical problems in attempting to determine exactly what work was done by picket line-crossing hyphenates are overwhelming. (On the other hand, the problem may emanate precisely from the witnesses' knowledge of semantics.)

The networks, for example, presented evidence that their policy was to refrain from requiring hyphenates who crossed the picket line to perform any "covered writing services" [Tr. 1352/3-15]. On examination, "covered writing services" was defined by the witness as follows: "In the film agreement that is known in the trade as A through H is not covered" [Tr. 1352/17-18]. Another witness testified that the hyphenates

were not required to do any writing services "under the jurisdiction of the Guild Agreement" [Tr. 1313/10-19]. And a third witness concluded that reconstructing a story line, when done by a producer, would not be "writing" because it comes within the (a) through (h) functions [GCX 16 *O*(1) 129/19-26].

The contention, therefore, that the employers determined to not require writing services of their hyphenates, or that the hyphenates performed no writing services is too broad.

To evaluate the effect of this semantical melange, a review of some of the transcripts of those hyphenates who were tried shows that while a hyphenate would protest on the one hand that he did no "writing," he would readily admit to doing such things as orally rearranging scenes from that called for by the script [GCX 16 B 54/8 to 55/1; 76/24 to 78/9 (Robert Cinader)];[26] permitting a secretary, after consultation with the hyphenate, to make the actual physical changes in dialogue [GCX 16 B 55/21 to 56/17 (Robert Cinader)]; or orally ordering others to make changes in lines or words [GCX 16 F 69/14-25 (Hugh Benson)]. (Function [h], which the agreement describes as "writing," includes oral instructions, directions, or suggestions to a writer regarding a story or teleplay.)

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[26]At least one of the hyphenates testified that he had never —not even before the strike—put a pen to paper [GCX 16 F 58/3-5], and that his story credits and Guild membership had been obtained by giving oral instructions to another writer, who executed them [GCX 16 F 57/1-28].

And this was only what the hyphenates *admitted* doing! Board Member Fanning, in *Chicago Typographical Union 16 (Hammond Pub., Inc.)*, 216 N.L.R.B. No. 149, 88 L.R.R.M. 1378 (1975), cogently asked,

> How, during a work stoppage, is the Union supposed to determine whether struck work is actually being performed, let alone guage the percentage of struck work? 88 L.R.R.M. at 1383 n.21.[27]

That (a) through (h) work was performed during the strike by many hyphenates is acknowledged [A 170]. This being the case, should the Court agree that (a) through (h) functions are rank-and-file work, the conclusion is that the hyphenates performed rank-and-file work during the strike.

3. There Was No Evidence That the Hyphenates Performed Non-Rank-and-File Work.

Hyphenates for the most part had dual functions: some acted as producers, others as directors, executives or story editors. These other functions sometimes required that the hyphenate perform as a supervisor; but they also required that he perform rank-and-file producer work, rank-and-file director work, rank-and-file executive work and rank-and-file story editor work.[28]

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[27]The fact that one hyphenate was willing to present a copy of the script which he was producing to show that no writing had been done says nothing about the writing he may have done on other scripts, or about the writing of other hyphenates, especially when of the sixteen trials, the hyphenate failed to personally show up in twelve, and sent a surrogate witness and a lawyer, instead.

[28]An example is David Levinson, who was a producer before the strike [GCX 16 G 52/28 to 53/3]. Levinson honored the picket line for a while, until he was promoted to an executive position [*id.*, 54/26 to 55/10], where his

Particularly in the case of the story editor, with no writers on the premises there would be no supervisorial functions to perform.

An example of what was done by one hyphenate is presented in the testimony of William Roberts. In 1970 he secured the rights to a story, which he rewrote into a script on a speculative basis, that is, without a prior commitment of sale [GCX 16 H 61/8-25]. The script was presented to Twentieth Century-Fox, which entered into a writing employment agreement with him [*id.*, at 62], for the purposes of his making revisions in the script [*id.*, at 63]. Concurrently, he entered into an agreement to furnish his services as a producer for the motion picture that was to be produced from his script [*id.*, at 64-65]. The revisions he was hired to write were made throughout the production by Roberts (the writer-producer) and by another writer [*id.*, at 65]. Notwithstanding the script, however, the director photographed the film with an ending which startled all those who had worked on it [*id.*, at 66], and Roberts testified that one of the reasons he went through the picket lines was to keep an eye on the director to make certain the ending was reshot as the studio ordered it done and as he had written it [*id.*, at 67-68]. On the occasions that he crossed the picket lines to make certain that his scripts was faithfully followed, he was there "mostly as an observer" [*Id.*, at 72].

This narration points up first, the evolution of a writer-producer, that is, one who either submits a script

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total duties during the strike were "just a matter of discussing with the CBS executives the status of some projects that had already been in work prior to the strike and having general suggestions as to what the projects should be" [*id.*, 55/11-18]. This is not even supervisorial work, let alone grievance adjustment or bargaining.

on which he then produces and performs writing functions during the course of production, or who takes another's script and embellishes it. During the time he is "producing," he is also "writing," notwithstanding that under the Guild's agreement the writing functions may not be such as to subject him to the agreement. Second, the narration shows that Roberts was not performing any services that could be classified as collective bargaining or grievance adjustment. He was disciplined for crossing a picket line on an occasion that he was simply observing others' functions to ensure that the script which he had written was being faithfully executed. His interest in being present was *as a writer* who did not want to have the director tamper with his script.

Substantial evidence is lacking, for the proposition that each of the disciplined hyphenates performed supervisory work, or that they were disciplined for performing such work.

CONCLUSION.

The instant case was tried at a time when under the Board's theory it was unnecessary to establish § 8(b)(1)(B) functions, *see NLRB v. Rochester Musicians Ass'n, Local 66,* 514 F.2d 988, 1002 n.5 and surrounding text (2d Cir. 1975), and when the type of work performed by supervisors during a strike was irrelevant. Both theories are now defunct, and the attempt to justify the present decision without these theories cannot be done. The evidence is simply not there. There is no evidence with respect to each hyphenate of that person's § 8(b)(1)(B) functions, and no evidence with respect to each of those persons' performance of work during the strike. Without such

a basis, the conclusion of a § 8(b)(1)(B) violation cannot stand.

Finally, the attempt by the Board to outlaw the discipline of supervisors for strikebreaking has once been struck down by the Supreme Court. The Board should not be permitted in this case to circumvent *Florida Power.*

For these reasons, the Board's application for enforcement of its order should be denied.

Respectfully submitted,

REICH, ADELL & CROST,
SELVIN & WEINER,

By JULIUS REICH,

Attorneys for Respondent Writers Guild of America, West, Inc.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 6500 Flotilla Street, Los Angeles, California.

On March 25, 1976, I served the within RESPONDENT OPENING BRIEF in re: "American Broadcasting Companies, Inc. vs. National Labor Relations Board" in the United States Court of Appeals, for the Second Circuit, No. 75-4089 and 75-4121;

on the attorneys in said action, by placing 2 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

ELLIOTT MOORE, DEPUTY ASSOCIATE GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, 1717 Pennsylvania Avenue NW Washington DC 20570; EMANUEL DANNETT, GRAUBARD, MOSKOVITZ MC GOLDRICK, DANNETT & HOROWITZ, 345 Park Avenue, New York New York 10022; HARRY J. KEATON, ANDREW B. KAPLAN, MITCHELL, SILBERBERG & KNUPP, 1800 Century Park East Suite 800, Los Angeles, CA 90067; RICHARD FISHER, O'MELVENY & MYERS, 611 West 6th St., Los Angeles, CA 90017; LARRY A. CURTIS, MUSICK PEELER & GARRETT, One Wilshire Bldg., Los Angeles, CA 90017;

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on March 25, 1976, at Los Angeles, California

Kathleen E. Terrell

Service of the within and receipt of ~~a~~ copy thereof is hereby admitted this 25th day of March, A.D. 1976.

Prog Service Enclosed

By